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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE WESLEY,

Defendant and Appellant.

C086073

(Super. Ct. No. 16FE014705)

Defendant Clarence Wesley challenges his 25-year-to-life sentence. He contends that in sentencing him, the trial court may have improperly applied three prior strike convictions arising out of a “single incident involving a single victim” in violation of *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). He seeks remand for an evidentiary hearing to determine whether the facts giving rise to his three prior strike convictions support his claim. We will affirm.

BACKGROUND

While on parole for crimes of forcible oral copulation, penetration with a foreign object by force, and robbery,¹ defendant was arrested and charged with multiple new felonies arising from a knife assault on his girlfriend.

In the instant case, the jury found defendant guilty of domestic violence and making criminal threats and found true sentencing enhancement allegations. In bifurcated proceedings, the trial court found true a prior conviction for domestic violence and the three prior strike convictions: forcible oral copulation, penetration with a foreign object by force in concert with others, and robbery.

Defendant moved to strike one of his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; the trial court denied his motion. The court then sentenced defendant to a term of 25 years to life, plus 10 years for his domestic violence conviction and related enhancements. The court imposed an additional sentence of 25 years to life, plus one year, on defendant's conviction for making criminal threats and the related enhancement, but stayed execution of that sentence pursuant to Penal Code section 654.²

¹ The probation report, which the trial court relied upon at sentencing after it was reviewed by the parties, describes defendant's prior crimes: A 24-year-old female victim met defendant, another man, and a woman and ended up in a vacant residence. There, defendant beat the victim, then both men took turns raping her. Defendant directed the woman to insert a beer bottle inside the victim's vagina, then other men arrived and they too took turns raping the victim. Defendant and the woman took the victim's personal property by force, including her clothing, wallet, and purse. Defendant and the others eventually dragged the victim by her hair out to the back of the house and threw her over a chain-link fence into a creek area. The victim lay there screaming for help until someone found her and took her to the hospital.

² Further undesignated statutory references are to the Penal Code.

DISCUSSION

Defendant argues that his 25-year-to-life sentence may be unauthorized under *Vargas*. He asks this court to remand the matter for an evidentiary hearing to determine whether the three prior strike convictions found true in this action, and relied upon by the trial court at sentencing, involve a “single incident.” The People contend defendant forfeited his claim by failing to argue the *Vargas* issue in his *Romero* motion. Even assuming the claim was not forfeited, it fails and defendant’s contrary assertions notwithstanding, remand is not necessary to make that determination.

In *Vargas*, the defendant was convicted of “two different crimes (robbery and carjacking) that were based on her commission of the same act (forcibly taking the victim’s car).” (*Vargas, supra*, 59 Cal.4th at p. 645.) The court distinguished cases, such as the one before it, involving “multiple criminal convictions stemming from the commission of a single act,” from cases involving “multiple criminal acts (albeit committed in a single course of conduct).” (*Id.* at p. 648, italics omitted.) In the former circumstance, but not the latter, the court found “the nature and circumstances of defendant’s prior strike convictions demonstrate the trial court was required to dismiss one of them because failure to do so would be inconsistent with the spirit of the Three Strikes law.” (*Id.* at p. 649.) *Vargas* presented one of these “extraordinary cases,” as her prior offenses involved a single qualifying act. (*Ibid.*)

Here, defendant was previously convicted of forcible oral copulation, penetration by a foreign object with force in concert with others, and second degree robbery. As noted in the probation report,³ and by the prosecutor in this case, defendant’s prior strike

³ Defendant asserts that reliance upon the probation report for the facts underlying his prior convictions is prohibited because it constitutes “double hearsay,” but cites no authority for the proposition. A contention not supported by citation to legal authority is forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(B); *County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1196, fn. 7.) In any event,

convictions involve a “brutal incident that occurred over [a] several hour period of time where a young woman was sexually assaulted and robbed.” The People are correct that different actus rei are required to complete each of these crimes. To be convicted under section 287, subdivision (d) (former § 288a, subd. (d)), there must have been a completed act of forced oral copulation, i.e., contact between “the mouth of one person [and] the sexual organ or anus of another person.” (§ 287, subd. (a).) To be convicted under sections 264.1 and 289, subdivision (a), there must have been a completed act of sexual penetration of the victim with a foreign object. And to be convicted under section 211, defendant must have taken the victim’s personal property from his or her immediate presence by means of force or fear.

The elements of defendant’s prior crimes, even with no additional information, establish that defendant committed multiple, separate criminal acts, not a single act resulting in three distinct convictions. (*Vargas, supra*, 59 Cal.4th at p. 649.) As such, *Vargas* simply does not apply.

“ ‘[d]ue process does not require a judge to draw sentencing information through the narrow net of courtroom evidence rules . . . sentencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes.’ [Citation.] Probation reports are among the permissible sentencing data the court may consider.” (*People v. Baumann* (1985) 176 Cal.App.3d 67, 81; see also *People v. Dyas* (1979) 100 Cal.App.3d 464, 469 [“A court properly may rely upon hearsay evidence in a probation report at a sentencing hearing”].) Regardless, even if we were to rely only upon the prior convictions themselves (which are indisputably part of the record), the elements of those crimes are enough to establish the distinct criminal acts underlying each conviction.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

DUARTE, Acting P. J.

RENNER, J.